**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 646 OF 2000**

1. Smt.Shewantabai @ Housabai
   Shankar Kadam.
2. Sou.Rukminibai Manik Gaikwad
   Age: 70 years, Occ.:Housewife.
3. Sou.Sarubai Bhanudas Shinde,
   Age: 46 years
   All residing at Rajapur,
   Tal. Sangola, Dist.Solapur. .... Appellants.
   (Org.Defendants)

Versus.

1. Smt.Dhondubai @ Kondabai
   Jagannath Gaikwad,
   Age: 65 yrs., House work
   residing at Tasgaon,
   Dist. Sangli.
2. Manager, The Solapur Land,
   Mortgage Bank Officer,
   at Solapur, Near Collectorate
   Office Solapur. .... Respondents.
   (No.1-Org.Plaintiff)

Shri M.A.Patil for the Appellants.

Shri R.V.More for the Respondent No.1.

**CORAM ; ABHAY S. OKA, J.**

**Date of reserving Judgment. : 1st September, 2004.**
**Date of pronouncement of Judgement : 14th September, 2004.**

**JUDGMENT.**

1. By order dated 10th April 2001 notice was ordered to

be issued to the Respondent No.1 with a direction that the Second Appeal may be decided finally at admission stage. I have accordingly heard the Counsel appearing for the Appellants and the Counsel appearing for the Respondent No.1. Service of notice on the Respondent No.2 is dispensed with as the Respondent No.2 is neither a necessary nor a proper party to the Appeal.

2. The following substantial questions of law arises in the Second Appeal:

> "Whether the Respondent No.1/Org.Plaintiff is entitled to 9/20th share in the suit property in view of the provisions of the Hindu Succession Act, 1956 ?"

I have heard the learned Counsel appearing for the parties on the aforesaid substantial question of law. The Respondent No.1 herein is the Plaintiff and the Appellants herein are the original Defendants Nos.1 to 3. With a view to understand the controversy between the parties it will be necessary to refer to the genealogy showing the relationship between the parties, which is more or less admitted by the parties:

SHANKAR
(died on 9th September 1957)

| | |
|---|---|
| Shewantabai (First wife of Shankar) | Shewantabai alias Housabai (Second wife of Shankar) (Appellant No.1-Deft.No.1) |

| | | |
|---|---|---|
| Dhondubai (Respondent No.1/ Plaintiff) | Rukminibai (Appellant No.2/ Defendant-2.) | Sarubai. (Appellant No.3/ Defendant-3.) |

The suit is filed by the Respondent No.1 for partition and separate possession of immoveable property in the hands of father of Respondent No.1 Shankar. The property in the hands of Shankar was admittedly ancestral property. Shankar was having two wives. Respondent No.1 is daughter of one wife Shewantabai and the Appellant No.1 is another wife of deceased Shankar. It is an admitted position between the parties that both the marriages of Shankar had taken place before coming into force the law prohibiting bigamous marriages. Shankar admittedly expired after coming into force of Hindu Succession Act, 1956 (hereinafter referred to as "the said Act of 1956"). His first wife Shewantabai expired thereafter. The suit was filed by the Respondent No.1 for partition.

3. The suit was contested by the Appellants by filing Written Statement. A case was sought to be made out that the Appellant No.1 was the only legally wedded wife of Shankar and the mother of Respondent No.1 never married to Shankar. It was sought to be contended by the Defendants that the suit was barred by limitation and it was not maintainable on account of non-joinder of necessary parties. The trial Court decreed the suit by granting 5/12 share to the Respondent No.1. An Appeal was preferred by the Appellants before the District Court which was dismissed. However the Appellate Court modified the Decree of the Trial Court by directing that the Respondent No.1 was entitled to 9/20th share.

4. The learned Counsel appearing for the Appellants/org.Defendants Nos.1 to 3 submitted that the suit was not maintainable on account of non-joinder of necessary parties. He submitted that the share granted to the Respondent No.1 is excessive. He submitted that the succession will be governed by section 8 of the said Act of 1956 and not by section 6 of the said Act of 1956. He submitted that the share granted to the Respondent No.1 is on the higher side. Shri More the learned Counsel appearing for the Respondent No.1 supported the Judgment and Decree of the Appellate

Court.

5. In so far as the issue of non-joinder of necessary parties is concerned, the contention of the Appellant is that the brothers and sisters of the deceased Shankar were necessary parties. The said argument has been negatived by the Courts below by holding that the brother and sisters have nothing to do with the suit property. In view of the findings recorded by the Courts below, there is no substance in the said contention and no substantial question of law arises on the basis of the said contention. I have accordingly not framed any substantial question of law on the basis of the said submission.

6. The learned Counsel appearing for the Appellants submitted that section 6 will not apply as the deceased Shankar had no son. It is therefore necessary to refer to section 6 which reads thus:

> 6. Devolution of interest in coparcenary property.- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members

of the coparcenary and not in accordance with this Act.

. **Provided that**, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

. Explanation 1.- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death irrespective of whether he was entitled to claim partition or not.

. Explanation 2.- Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

7. Section 6 will have an application to the facts of the case. It is not in dispute that the suit property was an ancestral property in the hands of Shankar. A finding to that effect has been recorded in pragraph No.12 of the Appellate Court Judgment. Therefore the widows are entitled to a share at the time of partition. The widows are also female relatives specified in class 1 of the Schedule to the said Act of 1956. Therefore, section 6 will have to be applied. There will be a notional partition between the parties in which at the time of death of Shankar, he will have 1/2 share and his two wives will take 1/2 share together i.e. both will have 1/4 share each. It is an admitted position that the mother of Respondent No.1 expired after demise of Shankar. In so far as 1/2 share of Shankar is concerned, the same will devolve as per the provisions of section 8 of the said Act of 1956. While doing so, the two widows of Shankar will get one share in view of Rule 1 in section 10 of the said Act of 1956. Therefore, in the said 1/2 share of Shankar each widow will get 1/8th share together and Respondent No.1 and Appellant Nos.2 and 3 being daughters will get the equal 1/8th shares each. Therefore, 1/2 share of deceased Shankar will be divided in four shares. Thus the widows will get 1/16th (i.e. 1/2 of 1/8th) share each and the

daughters i.e. the Appellants Nos.2 and 3 and the Respondent No.1 will get 1/8th share each. Thus the widows of Shankar will get 1/4th plus 1/16th share. Thus the widows will be entitled to get 5/16 share. So far as Respondent No.1 is concerned, after demise of her mother in view of section 15(1) of the said Act of 1956 she will inherit the entire share of her mother. Therefore, Respondent No.1 will get 1/8th share plus 5/16th share which is 7/16th share in the suit proeprty. In so far as Appellant No.1 is concerned she will get 1/4th share plus 1/16th share which is equivalent to 5/16th share. Thus the Appellate Court has committed an error by awarding 9/20th share to the Respondent No.1/Plaintiff. To that extent the appeal will have to be allowed partly. Hence the following order:

8. The Appeal is allowed partly. The Decree is modified only to the extent that the Respondent No.1 will be entitled to 7/16th share in the suit property. Clauses (b) to (e) of the Decree passed by the Trial Court are confirmed subject to above modification in clause (a). There will be no order as to costs.

**Judge.**